

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FOR EPA USE ONLY

SUBJECT: Hawaiian Authority to Administer the
NPDES Program

DATE: 10/16/74

FROM: Regional Counsel

TO: Director, Enforcement Division

On June 12, 1974 this office sent you a copy of our then most recent comparison of Hawaiian legal authority to EPA requirements for assumption of the NPDES permit program. At that time we noted that their legal authority was not complete.

The following elements of 40 CFR Part 124 (State Program Elements Necessary for Participation in the NPDES) were cited as areas where Hawaiian authority was uncertain or inadequate:

- 40 CFR 124.21(a)-(c)
- 40 CFR 124.41(a)-(d)
- 40 CFR 124.45(b)(1)-(3)
- 40 CFR 124.92(a)-(d)
- 40 CFR 124.71(a) and (c)
- 40 CFR 124.93

Other than the above cited elements it was felt that the Hawaiian statutory-regulatory scheme met the minimum requirements of Part 124 when reviewed from an "inclusive" viewpoint. By "inclusive" we mean that each element listed in 40 CFR Part 124 as a requirement of a State program was sought to be matched ("included") with an element of Hawaiian law. No attempt was made to examine Hawaiian law, toward inquiring if Hawaiian law exceeded Part 124 to the extent of contradicting that Part. As stated in our cover letter of June 12, 1974 this latter form of review will have to be done by the Hawaii Attorney General who should certify that nothing in Hawaii law contradicts EPA requirements for the assumption of the NPDES program.

Regarding the present status of the Hawaiian legislative-regulatory scheme, we shall presume that Hawaii has not, since our last review, amended its statutes or regulations in a manner which will remove any of the authority found to be present in our revision of June 12. This review will concentrate on the program elements listed above which were at the time of our last review found to be uncertain or inadequate.

FOR EPA USE ONLY

10.01.01.01

40 CFR 124.21(a)-(c)

<u>40 CFR §</u>	<u>Hawaii Authority</u>		<u>Comments</u>
	<u>Statutory</u>	<u>Regulatory</u> (Chapter 7 §)	
124.21(a)(1)	342-3, 342-6, 342-7, 342-33	(a)(1)	1
(2)	" " " "	(a)(2)	1
(3)	" " " "	(a)(3)	1
(b)	" " " "	(a)(3)	1
124.21(c)(1)	" " " "	(b)	1
(2)	" " " "	(d)	3

Due to a confusion in the status of this section, previous evaluations did not examine Hawaiian authority comparable to 40 CFR 142.21. The above evaluation indicates that we now find "authority present" to meet the requirements of 124.21 (a), (b), and (c)(1).

However, regulatory change will be required to meet the demands of 124.21(c)(2). This change is required because 124.21(c)(2) demands "(p) procedures which insure that, if a(n)...application is... deficient, processing... shall not be completed until... the applicant has... corrected the deficiency." Hawaii attempts to meet this requirement in Section 4(d) of Chapter 37, Public Health Regulations which states: "The Director... may insure that, if a(n)... application is... deficient, processing... shall not be completed until... the applicant has... corrected the deficiency."

The Federal requirement is mandatory in insisting that the State have "procedures which insure..." The State's regulation is discretionary in saying that "the Director...may insure..." The discretionary language of the statute should be amended appropriately.

40 CFR 124.41(a)-(d)

The requirements of 40 CFR 124.41 are:

§121.41 Prohibited discharges.

Any State or interstate agency participating in the NPDES shall insure that no permit shall be issued authorizing any of the following discharges:

- (a) The discharge of any radiological, chemical or biological warfare agent or high-level radioactive waste into navigable waters;

(b) Any discharge which the Secretary of the Army acting through the Chief of Engineers finds would substantially impair anchorage and navigation;

(c) Any discharge to which the Regional Administrator has objected in writing pursuant to any right to object provided the Administrator in Section 402(d) of the Act; and

(d) Any discharge from a point source which is in conflict with a plan or amendment thereto approved pursuant to Section 208(b) of the Act.

Hawaii has endeavored to meet these requirements through Section 15(e) of Chapter 37, Public Health Regulations which provides:

(c) In acting upon an NPDES application for an NPDES permit the Director may deny an NPDES application... if the discharge is any one of the following:

- (1) Discharge of any radiological, chemical, or biological warfare agent, or high-level radioactive waste into navigable waters;
- (2) Discharge which the Secretary of the Army acting through the Chief of Engineers finds would substantially impair anchorage and navigation;
- (3) Discharge to which the Regional Administrator has objected in writing pursuant to any right to object provided the Administrator in Section 402(d) of the Act; and
- (4) Discharge from a point source which is in conflict with a plan or amendment thereto approved pursuant to Section 208(b) of the Act.

The Federal requirement is an absolute prohibition of the four discharge categories (any State.. shall insure that no permit be issued...") while the State regulation is discretionary in permitting the denial of the four categories ("...The Director may deny an NPDES application... if the discharge is any one of the following:). The Hawaii Attorney General's statement of March 27, 1974 states on Page 4:

3. Authority to Deny Permits in Certain Cases:

State law provides authority to insure that no permit will be issued in any case where:

- a. The permit would authorize the discharge of a radiological, chemical, or biological warfare agent or high-level radioactive waste;
- b. The permit would, in the judgment of the Secretary of the Army acting through the Chief of Engineers, result in the substantial impairment of anchorage and navigation of any waters of the United States;
- c. The permit is objected to in writing by the Administrator of EPA, or his designee, pursuant to any right to object provided to the Administrator under Section 402(d) of the FWPCA; or
- d. The permit would authorize a discharge from a point source which is in conflict with a plan approved under Section 208(b) of the FWPCA.

State Statutory and Regulatory Authority:

§§342-3, 342-6, 342-33, Hawaii Revised Statutes, as amended by Act 118 (1973).

§§4, 15, Public Health Regulations, Chapter 37.

Remarks of the Attorney General:

The Director has broad powers to control and regulate water pollution. He is specifically given the power to adopt rules and regulations.

The State has attempted to meet this Federal requirement through enactment of specific regulations yet has fallen short of exact compliance. In this situation I do not believe that the Director's "...power to adopt rules and regulations" fills this gap. I believe the Director must actually enact the required changes before the State can "insure that no permit shall be issued..."

124.45(b)

The requirements of 40 CFR 124.45(b) are:

§121.45 Other terms and conditions of issued NPDES permits.

In addition to the requirements of §§124.42, 124.43, and 124.44 procedures of any State or interstate agency participating in the NPDES must insure that the terms and conditions of each issued NPDES permit provide for and insure the following:

(b) That the permit may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:

- (1) Violation of any terms or conditions of the permit;
- (2) Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; and
- (3) A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge:

Hawaii has endeavored to meet these requirements through Section 16(a) of Chapter 37, Public Health Regulations which provides:

- (a) Each NPDES permit shall be subject to revocation, to modification, or revision by the Director if he shall determine that:
 - (1) There is a violation of any condition of the NPDES permit, or
 - (2) The NPDES permit was obtained by misrepresentation, or failure to disclose fully all relevant facts, or
 - (3) The NPDES permit was willfully defaced, altered, forged, counterfeited, or falsified, or
 - (4) There is a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge, or

The Federal requirement is that the State insure that the modification, suspension or revocation provisions be "terms and conditions of each issued NPDES permit..." Hawaiian regulations provide the Director with the power to modify, suspend or revoke, but do not insure that those powers will be incorporated in the terms and conditions of each issued permit. The regulations should be modified to accomplish such an incorporation.

The Hawaii Attorney General's statement of March 27, 1974 states on Page 9:

10. Authority to Terminate or Modify Permits:

State law provides authority to terminate or modify permits for cause including, but not limited to, the following:

- a. Violation of any condition of the permit (including, but not limited to, conditions concerning monitoring, entry, and inspection);
- b. Obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts; or
- c. Change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

State Statutory and Regulatory Authority:

§342-6, Hawaii Revised Statutes, as amended by Act 113 (1973).

§16, Public Health Regulations, Chapter 37.

This is the only portion of the Attorney General's statement which could relate to the requirements of 124.45(d) and yet this section has not attempted to harmonize the apparent inconsistency between Federal and State regulations.

124.71(a) and (c)

No specific regulations required.

124.92(a)-(d)

No specific regulations required.

124.93

The requirements of 40 CFR 124.93 are:

§124.93 Continuing planning process.

Any State or interstate program participating in the NPDES must have an approved continuing planning process pursuant to section 303(e) of the Act and must assure that its approved planning process is at all times consistent with the Act.

No reference to Hawaii's continual planning process can be found in the statutes or regulations.

It is difficult to disagree with the Attorney General since he should have superior knowledge of his own State law. I think it will be a matter for the Regional Administrator to determine whether we do or do not look beyond the Attorney General's certification.



Cassandra Dunn